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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1511

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

-vs-

NICHOLAS A. POLITO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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COUNSEL FOR RESPONDENT

STATUTES INVOLVED

Illinois Revised Statutes 1969, Chapter 38, paragraph 107-5(d):

> All necessary and reasonable force may be used to effect an entry into any building or property or part thereof to make an authorized arrest.

Illinois Revised Statutes 1969, Chapter 38, paragraph 108-8:

> All necessary and reasonable force may be used to effect an entry into any building or property or part thereof to execute a search warrant.

QUESTION PRESENTED FOR REVIEW

Whether police officers executing an arrest warrant may violate a State statute by breaking into private premises without a prior announcement of their authority and purpose, especially when the officers deliberately failed to utilize earlier opportunities to effect the arrest in a public place because they hoped to find evidence in the private premises.

STATEMENT OF THE CASE

Respondent was charged with deviate sexual assault and battery. Prior to trial, he filed a motion to quash his arrest and suppress illegally obtained evidence. (RC. 121-22) At a hearing conducted on the motion, the evidence established that a warrant for respondent's arrest was issued on August 14, 1969. (RC. 9, R. 27) The warrant was based upon a complaint by respondent's receptionist who alleged that respondent sexually molested her on August 7 and 8, 1969. (R. 38-39)

On August 15, 1969, a group of police officers under the direction of Chicago Police Sergeant Louis Cantone was assigned to arrest respondent. (R. 22-23) The officers positioned themselves about a building in which respondent's office was located and awaited his arrival. (R. 13) At approximately 6:30 p.m. respondent drove his automobile into a nearby gas station. (R. 13, 25) He told Chicago police officer Harold McGrath, who was apparently posing as a gas station attendant, of some difficulty he was experiencing with his automobile. (R. 13) Respondent then proceeded into the building in which his office was located. (R. 13-14, 25) Sergeant Cantone estimated that he observed respondent ten or fifteen times that day prior to the time of the arrest. (R. 25) However, Cantone did not attempt to arrest respondent on those occasions because he "wanted to build a stronger case against him." (R. 53) Sergeant Cantone was aware of items in respondent's office which he hoped to seize as evidence. (R. 60) Cantone, however, never attempted to obtain a search warrant. (R. 61)

At approximately 10:15 to 10:45 p.m., Sergeant Cantone and other police officers arrested respondent using a sledge

hammer to break open a door to the private office in which respondent was located. (R. 20-21, 23) Prior to such entry, no one knocked on the door or otherwise announced the officers' presence and purpose. (R. 23-24)

At the time of the officers' entry into the office and subsequent to respondent's arrest, they obtained the evidence they hoped to find in the office. (R. 9-10, 60-61)

Following presentation of the foregoing evidence, respondent's counsel requested that all evidence obtained by the police be suppressed because the manner in which the police entered the office was in violation of an Illinois statute and the Fourth Amendment to the Federal Constitution. (R. 74-75) Counsel also urged suppression of the evidence on the ground that the arrest in the office was merely a pretext to search for evidence without obtaining a search warrant. (R. 75-76)

The trial court granted the motion to suppress evidence on the grounds that the forcible entry of the office in question by the police without a prior announcement of their authority and purpose violated both an Illinois statute and the Fourth Amendment to the United States Constitution. (R. 131-41) The trial judge expressly found: "There is[sic] no exigent circumstances which would excuse the police from at least knocking and announcing their office." (R. 138)

REASONS FOR DENYING THE WRIT

THE UNNECESSARY AND UNREASONABLE FORCE EMPLOYED BY THE POLICE TO ENTER A PRIVATE OFFICE TO ARREST RESPONDENT VIOLATED STATE LAW THEREBY VITIATING THE LEGALITY OF RESPONDENT'S ARREST.

The legality of an arrest by state police officers is determined by state law. (Ker v. California, 374 U.S. 23, 37, 10 L. Ed 2d 726, 741, 83 S. Ct. 1623.) The Illinois Code of Criminal Procedure prohibits the use of unnecessary and unreasonable force in effecting an arrest. (Illinois Revised Statutes 1969, ch. 38, par. 107-5(d).)[1] A substantially identical provision of the Code concerning the use of force in the execution of a search warrant (Illinois Revised Statutes 1969, ch. 38, par. 108-8))[2] has been construed to require a prior announcement of authority and purpose unless there are exigent circumstances at the time of entry which excuse compliance with such requirement. (People v. Stephens, 18 Ill. App. 3d 817, 821,310 N.E. 2d 755; People v. Richard, 34 Ill. App. 3d 621, 339 N.E. 2d 400; People v. Jackson, 37 Ill. App. 3d 279, 345 N.E. 2d 509.) Inasmuch as the provisions of the Illinois Code of Criminal Procedure concerning the use of force in effecting an arrest and executing a search warrant employ the same operative language, the trial court correctly concluded that, absent exigent circumstances, a forcible entry of private premises to effect an arrest without a prior announcement by the police of their authority and purpose is violative of Illinois law. (R. 132)

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1. "All necessary and reasonable force may be used to effect an entry into any building or property or part thereof to make an authorized arrest."

2. "All necessary and reasonable force may be used to effect an entry into any building or property or part thereof to execute a search warrant.

The arresting officers did not knock on the door, or otherwise announce their presence, authority or purpose, before they broke the door open to arrest respondent. Consequently, unless there was some exigent circumstance to justify the officers' failure to give notice of their intended entry, the force used to enter the office was unnecessary, unreasonable and in violation of Illinois law.

The trial court specifically found that there were no exigent circumstances which justified the arresting officers' failure to announce their authority and purpose prior to breaking into the office where the arrest was effectuated. (R. 135-138) Such finding was sustained by the Illinois Appellate Court. (People v. Polito, 42 Ill. App. 3d 372, 355 N.E. 2d 725.) The Illinois Supreme Court denied petitioner's request for further review.

Petitioner challenges the findings of the Illinois courts claiming that the officers' unannounced forcible entry was justified because they purportedly had probable cause to believe that a crime was in progress and sought to protect the complainant from harm. Petitioner's argument is defective for several reasons.

Initially it should be noted that there was no finding by the Illinois courts that the officers had probable cause to believe that a crime was being committed at the time of their unannounced forcible entry of the private office. The trial judge correctly concluded that there was no issue in the case concerning probable cause for a warrantless arrest since the arresting officers possessed a concededly valid arrest warrant. (R. 137)

Furthermore, there was no probable cause for the arresting officers to believe that a crime was being committed at the

time of their unannounced break-in to the office. The evidence indicated that the police received complaints from some of respondent's female patients that they were sexually molested by respondent while they were anesthetized in connection with dental care they received from respondent. (R. 34-38) On August 12, 1969, respondent's receptionist alleged that she had been sexually molested by respondent on August 7th and 8th, 1969. (R. 38, 48) She agreed to notify the police of her next appointment with respondent for dental work. (R. 39) On August 14, 1969, the complainant informed the police that she would be receiving dental care services from respondent the following day. (R. 39) On August 15, 1969, the day of the arrest, the complainant had "an iridescent powder" applied to her vagina. (R. 58) She "agreed to allow herself to be sexually molested" to obtain evidence against respondent. (R. 55) That night respondent arrived at his office at approximately 6:30 p.m. (R. 13, 25) The police did not attempt to arrest respondent until approximately four hours later. (R. 43) Prior to the arrest, the complainant signalled the police officers that she had taken a pill which ordinarily preceded the administration of anesthetic. (R. 54) Thereafter the officers observed respondent pick up "a gas mask or cannister" in his office. (R. 44) The office lights were turned down. (R. 44) The complainant left the office. (R. 44) The police subsequently entered respondent's office. (R. 45) No one was there. (R. 45) The police proceeded to an adjoining office where they heard "music playing softly from inside." (R. 46) They did not hear "any cries for help or screams." (R. 22) Prior to entering the office, the police did not observe respondent

commit any crime. (R. 22) Consequently, the officers merely had reason to believe that the complainant voluntarily took a pill and left respondent's office after which respondent picked up a gas mask or cannister, turned down the lights and also left the office. Such circumstances do not suggest criminal activity and, therefore, did not provide the officers with probable cause to believe that a crime was being committed.

Similarly, the officers had no reason to believe that the complainant was in a position of peril. Inasmuch as there was no probable cause to believe that a crime was being committed, there was no reason to believe that the complainant was in danger of any concomitant harm.

In addition, even if it is assumed for the sake of argument that the complainant was in a perilous position, the officers were not justified in forcibly entering the office without first announcing their presence and purpose because they created any potential peril. As aptly stated in McKnight v. United States, 183 F. 2d 977, 978:

> "To execute the warrant for [defendant's] arrest there was no necessity to break open doors; or, what comes to the same thing for legal purposes, none but what the officers themselves created.*** 'It would appear that the officers deliberately let him get to his own front door before they attempted to approach. If thereafter there was a semblance of emergency requiring the breaking of the door, it was created by the officers.' Neither policemen nor private citizens can justify breaking into a house, or other violence by deliberately creating an alleged necessity for it."

In the case at bar, the complainant "agreed to allow herself to be sexually molested" as part of a scheme designed by police to obtain evidence against respondent. (R. 55) Pursuant to such scheme, the police rejected a convenient opportunity to arrest respondent outside the building which housed his

office and permitted him to enter his office where he remained for several hours with the complainant. Thereafter the complainant voluntarily took a pill and went into the adjoining office where the arrest was eventually effectuated. If there was any danger to the complainant in these circumstances, it was the product of the scheme designed by the police in which the complainant willingly participated. Therefore, any supposed danger to the complainant cannot justify the officers' failure to announce their presence and purpose prior to forcibly entering the private office to arrest respondent.

Finally, there was no evidence presented to indicate that any danger to the complainant would have increased if the police complied with the requirement of announcing their authority and purpose before breaking into the office. Rather, the trial court found that the additional five to fifteen seconds it may have taken the police to comply with the announcement requirement " would not have put the complaining witness in more jeopardy than she was already." (R. 136) Therefore, the officers were not justified in failing to announce their presence and purpose prior to forcibly entering the office.

CONCLUSION

The trial court correctly concluded that the police violated an Illinois statute in effecting respondent's arrest. Since the judgment from which review is sought must be sustained as a matter of state law, no cogent reason exists for reviewing the constitutional basis of the judgment. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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